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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HASSAN H. HASHEMI,

Plaintiff and Appellant,

v.

JOSE L. CRUZ,

Defendant and Respondent.

G055014

(Super. Ct. No. 30-2015-00823595)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Randall J. Sherman, Judge. Affirmed.

Legalaxxis, Inc., Nazgole Hashemi and Tannaz H. Hashemi for Plaintiff and Appellant.

Taylor and Anderson, Elizabeth V. McNulty and Christine Diaz Reynolds for Defendant and Respondent.

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A supervisor who harasses an employee can be held personally liable—and the employer is vicariously liable—under the Fair Employment and Housing Act (FEHA). But a supervisor who does not harass an employee cannot ordinarily be held personally or vicariously liable for the conduct of his or her subordinate supervisors. (*Reno v. Baird* (1998) 18 Cal.4th 640 (*Reno*); *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318 (*Fiol*).)

Here, a university professor sued his direct supervisor (a dean), the dean's supervisor (a provost), and the university for workplace harassment. The trial court granted the provost's motion for summary judgment. The court found that while the dean may have harassed the professor, the provost's "conduct amounts, at most, to supervisory and managerial decisions undertaken in the course and scope of his employment, which are not actionable under the FEHA."

We agree and affirm the trial court's order granting summary judgment.

I

FACTS AND PROCEDURAL BACKGROUND

In May 2016, plaintiff and appellant Dr. Hassan H. Hashemi, an electrical engineering professor at California State University, Fullerton (CSUF), filed a second amended complaint against CSUF (the Board of Trustees) for harassment, hostile work environment, and related claims. The complaint also named Dean Raman Unnikrishnan, Provost Jose L. Cruz (respondent), and President Mildred Garcia as individual defendants in the claims of harassment and hostile work environment. The prayer for relief included a request for punitive damages.

Professor Hashemi's complaint alleged that in January 2010, Dean Unnikrishnan "made anti-Semitic comments about Jewish faculty members to Dr. Hashemi." It was alleged that in April 2013 Hashemi testified in an open hearing against Unnikrishnan and mentioned the anti-Semitic comments. The complaint generally

alleged that thereafter Unnikrishnan “had a personal vendetta against” Hashemi and other Iranian-American instructors, and that all of the named defendants then collectively engaged in various acts of retaliation, harassment, and racial discrimination.¹

In June 2016, President Garcia and Provost Cruz filed a motion to strike Professor Hashemi’s request for punitive damages. The court granted the motion stating Hashemi’s “allegations against Cruz and Garcia primarily consist of their inactions, their failure to stop the alleged harassment, or their tolerance of a hostile work environment. Defendants Garcia and Cruz cannot be held personally liable as aiders and abettors of defendant [Dean] Unnikrishnan for failing to prevent his alleged misconduct, much less to be held personally liable for punitive damages.”²

In August 2016, Professor Hashemi filed a third amended complaint, which now prayed for punitive damages only as to Dean Unnikrishnan. Shortly thereafter, Hashemi dismissed claims against President Garcia in exchange for a waiver of costs and fees. Hashemi then dismissed claims against Unnikrishnan and CSUF following his acceptance of a \$50,000 offer to compromise.

In January 2017, Provost Cruz filed a motion for summary judgment “on the ground that the undisputed facts establish that, as a matter of law, [Professor Hashemi] is unable to state a cause of action against Jose L. Cruz for harassment and hostile work environment.” The court granted the motion: “Cruz’s conduct amounts, at most, to supervisory and managerial decisions undertaken in the course and scope of his employment, which are not actionable under the FEHA.”

¹ The underlying facts will be reviewed more fully within this opinion.

² We are not addressing Hashemi’s additional claim of error regarding the trial court’s striking of punitive damages because it is rendered moot. That is, we are affirming the court’s order granting summary judgment; therefore, Hashemi cannot recover punitive damages. (See *Mother Cobb’s Chicken T., Inc. v. Fox* (1937) 10 Cal.2d 203, 205.)

II DISCUSSION

Summary judgment “provide[s] courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 844.) The moving party bears the initial burden to make a prima facie showing that no triable issue of material fact exists. (*Id.* at p. 843.) If this burden is met, the party opposing the motion bears the burden of showing the existence of disputed facts. (*Ibid.*)

We review the trial court’s decision de novo. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68.) “In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence, . . . summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact.” (Code Civ. Proc., § 437c, subd. (c).)³

1. Relevant Legal Principles

Under the FEHA, it is an unlawful “[f]or an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition[, etc.,] . . . to harass an employee” (Gov. Code, § 12940, subd. (j)(1).) “[L]iability for harassment is broader than liability for discrimination. [L]iability for harassment, which extends to ‘any person’ and hence extends to ‘individuals,’ encompasses individual supervisory employees.” (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 65.)

³ All further undesignated statutory references will be to the Code of Civil Procedure.

“Harassment,” as the term has been interpreted under the FEHA ““consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer’s business or performance of the supervisory employee’s job.”” (*Reno, supra*, 18 Cal.4th at pp. 645-646.)

“The case and statutory authority set forth three clear rules. First, . . . a supervisor who personally engages in . . . harassing conduct is personally liable under the FEHA. Second, . . . if the supervisor participates in the . . . harassment or substantially assists or encourages continued harassment, the supervisor is personally liable under the FEHA as an aider and abettor of the harasser. Third, under the FEHA, the employer is vicariously and strictly liable for . . . harassment by a supervisor.” (*Fiol, supra*, 50 Cal.App.4th at p. 1327.) However, a supervisor’s “[m]ere knowledge that a tort is being committed and the failure to prevent it” is not substantial subsistence or encouragement because ““one owes no duty to control the conduct of another.”” (*Id.* at p. 1326.)

When a plaintiff claims that a supervisor has created a hostile or abusive work environment due to harassment, the plaintiff must prove the following elements: 1) the plaintiff was an employee; 2) the plaintiff was subjected to harassing conduct; 3) the conduct was severe or pervasive; 4) a reasonable person would have considered the work environment to be hostile or abusive; 5) the plaintiff considered the environment to be hostile or abusive; 6) *the supervisor participated in, assisted with, or encouraged the harassing conduct*; 7) the plaintiff was harmed; and 8) the conduct was a substantial factor in causing the harm. (CACI No. 2522A; Gov. Code, § 12940, subd. (j)(1).)

2. *Material Undisputed Facts*

In a summary judgment motion, the moving party “shall include a separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed.” (§ 437c, subd. (b)(1).) The opposing party “shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating if the opposing party agrees or disagrees The statement also shall set forth plainly and concisely any other material facts the opposing party contends are disputed.” (§ 437c, subd. (b)(3).)

Courts accept as “undisputed” the moving party’s alleged material facts that are not contradicted by the opposing party’s evidence; courts similarly accept as “undisputed” the opposing party’s alleged material facts that are not contradicted by the moving party’s evidence. (*Fraizer v. Velkura* (2001) 91 Cal.App.4th 942, 945.) “Materiality depends on the issues in the case, and what matters are at issue is determined by the pleadings, these rules of pleadings, and the substantive law.” (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 172.)

Here, the legal issue is fairly straightforward: whether there is any evidence that Provost Cruz participated in, assisted with, or otherwise encouraged the harassment of Professor Hashemi. With that relatively narrow issue in mind, we will summarize the following *material* undisputed facts as alleged by the parties.

In January 2010, Dean Unnikrishnan made anti-Semitic comments about Jewish faculty members to Professor Hashemi. Unnikrishnan told Hashemi that he wanted to “get rid” of these “f*cking Jews.”

In October 2012, there was an open hearing to discuss a proposal regarding a computer engineering program. Dean Unnikrishnan supported the proposal. Professor Hashemi and other faculty members opposed the proposal; at the hearing, Hashemi mentioned Unnikrishnan’s alleged anti-Semitic remarks. Thereafter, six Iranian-American professors, including Hashemi, were investigated for unprofessional conduct.

Cruz served as CSUF Provost and Vice President of Academic Affairs from December 2012 through August 2016. CSUF has approximately 39,000 students. Cruz was responsible for the operational oversight of eight colleges, along with a variety of other academic and administrative units. The deans from each of the colleges reported directly to Cruz. CSUF consists of about 500 staff members and 2,000 faculty members. The CSUF Division of Human Resources, Diversity, and Inclusion (HR), and the university's counsel were responsible for drafting notices of pending disciplinary action. Cruz was responsible for reviewing the notices of pending disciplinary action prior to the notices being issued to faculty members.

On November 13, 2013, Dean Unnikrishnan e-mailed Provost Cruz a draft notice of reprimand to be issued to Professor Hashemi. The reprimand generally concerned a memo Hashemi had written and widely distributed. The reprimand alleged that Hashemi had engaged in "name calling" and "malice" within his memo. Cruz discussed the allegations against Hashemi with Unnikrishnan, reviewed the draft notice, and ultimately signed the notice of pending disciplinary action. Cruz indicated that he was willing to meet with Hashemi to discuss his complaints regarding Unnikrishnan, so long as Unnikrishnan was present. CSUF issued revised reprimands in November 2013, February 2014, and June 2014. CSUF later withdrew the reprimands (the parties disagree as to why the reprimands were withdrawn).

In the fall of 2008, Professor Hashemi was given an accommodation for a disability, which allowed him to teach only two days a week (it appears that a more common schedule was to teach three days a week). In August 2014, Dean Unnikrishnan e-mailed the Vice President of HR and Provost Cruz stating that he thought that Professor Hashemi's reduced teaching schedule went beyond "a reasonable accommodation." Thereafter, a meeting among the managers was scheduled to discuss the accommodation. Hashemi was assigned a three-day per week teaching schedule, which reverted back to two days a week after Cruz and Unnikrishnan later left CSUF.

3. *Legal Analysis*

Based on the foregoing material undisputed facts—liberally construed in favor of Professor Hashemi—we find no evidence or reasonable inferences that Provost Cruz participated in, assisted with, or encouraged the alleged harassing conduct. That is, we find no alleged conduct by Cruz that fell outside of the scope of his administrative duties, or any alleged actions indicating that he engaged in harassing conduct ““for personal gratification, because of meanness or bigotry, or for other personal motives.”” (See *Reno*, *supra*, 18 Cal.4th at p. 646.) In sum, we agree with the trial court’s analysis that Cruz’s alleged “conduct amounts, at most, to supervisory and managerial decisions undertaken in the course and scope of his employment, which are not actionable under the FEHA.”

Professor Hashemi argues that “Provost Cruz acted in at least three reprehensible ways, which . . . amount to harassment under the FEHA.” We disagree.

Professor Hashemi asserts: “First, Provost Cruz issued the Notice of Pending Disciplinary Action . . . despite being personally aware of exonerating evidence and knowing that he was not supposed to engage in frivolous conduct . . .” Hashemi then goes on to cite “exonerating” evidence in the record that would have argued against Cruz issuing him a disciplinary notice. But this appears to be precisely the type of judgment (whether a disciplinary notice is warranted or not) that a senior level manager in a university (a provost) would be expected to make. Hashemi cites Cruz’s deposition testimony wherein Cruz acknowledges that he was not to perform his job “in a frivolous manner.” However, even if we assume that Cruz somehow acted frivolously, that conduct would not establish personal liability for harassment under the FEHA. (See *Fiol*, *supra*, 50 Cal.App.4th at p. 1331 [“A supervisor does not aid and abet a harasser by mere inaction. A supervisor does not aid and abet . . . by acts constituting personnel management decisions”].)

Hashemi claims: “Second, Provost Cruz assisted the Dean with disrupting Professor Hashemi’s reasonable disability accommodation, despite knowing that such issues were outside the scope of his duties.” Cruz testified that his responsibilities were limited in the area of disability accommodation: “I have no responsibility other than if I am asked to intervene to channel it to the appropriate parties” Hashemi alleges that Dean Unnikrishnan e-mailed Cruz in an effort to frustrate Hashemi’s request to teach only two days a week. Hashemi further alleges that Cruz was copied on related e-mails and that Unnikrishnan “kept involving Provost Cruz in conversations and decisions related to Professor Hashemi’s reasonable disability accommodation.” But there was no indication that Cruz became involved “for personal gratification, because of meanness or bigotry, or for other personal motives.” (See *Reno, supra*, 18 Cal.4th at pp. 645-646.) Again, actionable harassment under the FEHA “is not conduct of a type necessary for management of the employer’s business or performance of the supervisory employee’s job.” (*Ibid.*)

Professor Hashemi contends: “Third, Provost Cruz abandoned his responsibilities and violated confidentiality and University policy in connection with the faculty members’ complaints of harassment and retaliation against the Dean.” Hashemi argues that Cruz violated university policies by refusing to meet with Hashemi (and other faculty members) without Dean Unnikrishnan being present. But in his role as Provost and Vice President of Academic Affairs, Cruz was not responsible for investigating or responding to claims of alleged harassment or retaliation. Rather, those responsibilities were handled by HR and also by university counsel. Perhaps Cruz was not as familiar with the university’s personnel policies as were the other professionals within CSUF who were responsible for implementing those policies. Or perhaps Cruz believed he could mediate the dispute between the faculty members and Unnikrishnan. Regardless, there is no evidence supporting a reasonable inference that Cruz refused to meet with Hashemi

(and other faculty members) without Unnikrishnan being present “because of meanness or bigotry, or for other personal motives.” (See *Reno, supra*, 18 Cal.4th at pp. 645-646.)

Professor Hashemi primarily relies on *Miller v. Department of Corrections* (2005) 36 Cal.4th 446 (*Miller*), and *Roby v. McKesson* (2009) 47 Cal.4th 686 (*Roby*), for the proposition that: “A supervisor is liable for abusing job-created authority over an employee for personal reasons or engaging in conduct that has the secondary effect of conveying a hostile or offensive message.” (Original boldfacing omitted.) But the *Miller* and *Roby* opinions are readily distinguishable.

In *Miller*, several employees filed a complaint against the California Department of Corrections, the Valley State Prison for Women, and “Cal Terhune as *Director of the Department*” for “sexual discrimination and harassment in violation of the FEHA.” (*Miller, supra*, 36 Cal.4th at p. 451, italics added.) The employees generally alleged that the prison warden was having affairs with several female employees. (*Id.* at p. 453.) At issue in the Supreme Court was whether the trial court properly granted summary judgment; the plaintiffs argued that there was a triable issue of material fact. (*Id.* at pp. 451-452.) The Court found that “a jury reasonably could conclude that the [warden’s] conduct created a work environment that qualifies as hostile or abusive to employees because of their gender.” (*Id.* at p. 468.)

Here, unlike the warden in *Miller, supra*, 36 Cal.4th 446, there was no evidence that Provost Cruz engaged in any behavior for personal reasons unrelated to his managerial position. All of Cruz’s alleged actions concerning Professor Hashemi involved managerial decisions within the general scope of his job responsibilities. Moreover, as far as the liability of the California Department of Corrections Director in *Miller*, that person was sued in his official capacity and not as an individual. (*Id.* at p. 451.) Thus, the *Miller* opinion has little application to the legal issues raised in this case.

In *Roby*, an employee (Roby) sued her employer and her supervisor (Schoener) for harassment and related claims. (*Roby, supra*, 47 Cal.4th at p. 697.) Roby generally alleged that she suffered from panic attacks and she was terminated for reasons having to do with her disability. (*Ibid.*) The evidence at trial disclosed that “Schoener made negative comments in front of other workers about Roby’s body odor, although Schoener knew from Roby that medication was causing the odor.” (*Id.* at p. 695.) Moreover, “Schoener openly ostracized Roby in the office, refusing to respond to Roby’s greetings and turning away when Roby tried to ask questions, and Schoener made a facial expression of disapproval when Roby took rest breaks because of her panic attacks.” (*Ibid.*) The Supreme Court reinstated the jury’s \$500,000 harassment award against the employer and Schoener. (*Id.* at p. 720.) The Court found that Schoener’s actions could not “fairly be characterized as an official employment action. None involved Schoener’s exercising the authority that [the employer] had delegated to her Rather, these were events that were unrelated to Schoener’s managerial role, engaged in for her own purposes.” (*Id.* at p. 709.)

In this case, unlike the supervisor in *Roby, supra*, 47 Cal.4th 686, there was no evidence that Provost Cruz directly harassed Professor Hashemi, or acted outside of his delegated authority for his own purposes. Therefore, the *Roby* opinion also has very little application to the facts and the legal issues raised in this case.

III

DISPOSITION

The order granting Cruz's motion for summary judgment is affirmed.
Costs on appeal are awarded to respondent.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.